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July 30, 2007

DECISION AND ORDER  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: March 31, 2006

Case Number: TSO-0373

This Decision concerns the eligibility of XXXXXXXXXXXX (the individual) to obtain an access authorization (also called a security clearance) under the provisions of 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." For the reasons discussed below, I have determined that the individual's access authorization should not be granted.

**I. Background**

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

In the course of processing the individual's request for access authorization, the local DOE security office (DOE Security) obtained information that raised a number of concerns about his eligibility. The areas of concern included, among other things, the individual's history of alcohol use and some criminal activity. In July 2005, after interviewing the individual, DOE Security determined that he had not resolved its concerns, and referred him to a DOE-sponsored psychiatrist (DOE psychiatrist) for evaluation. After examining the individual, the DOE psychiatrist opined that the individual was alcohol dependent and was a user of alcohol habitually to excess. As a result of the interview and the DOE Psychiatrist's report, DOE Security issued a Notification Letter to the individual. In that letter, DOE Security stated that it had substantial doubt about the individual's eligibility for access authorization based on certain derogatory information that falls within the purview of four potential disqualifying criteria, 10 C.F.R. § 710.8 (f), (h), (j), and (l) (Criteria F, H, J and L, respectively).<sup>1</sup>

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<sup>1</sup> Criterion F relates, in relevant part, to information that a person "[d]eliberately misrepresented, falsified, or omitted significant information from . . . written or oral statements made in response to official inquiry on a matter

After receiving the Notification Letter, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). On April 5, 2006, the Director of the Office of Hearings and Appeals appointed me the Hearing Officer in this case. At the hearing, the individual testified on his own behalf, and called as witnesses his manager and his mother. DOE Security called the DOE psychiatrist as its only witness. The transcript of the hearing will be hereinafter cited as “Tr.” DOE Security submitted 17 exhibits into the record and the individual submitted one letter of recommendation; the DOE exhibits will be cited in this decision by their exhibit number.

## **II. Standard of Review**

The Hearing Officer’s role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual’s access authorization eligibility shall be resolved in favor of national security.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual’s age and maturity at the time of the conduct; the voluntariness of the individual’s participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and evidence presented by both sides in this case.

## **III. The Notification Letter and the Security Concerns**

In the Notification Letter, DOE Security cites four criteria as the bases for its concerns about the individual’s eligibility for an access authorization. Its Criterion F concerns arise from inconsistent information the individual provided regarding his past use of illegal drugs. Specifically, in Questionnaires for National Security Positions (QNSPs) that he completed in 2002 and 2004, the individual stated that he had not used illegal drugs within the preceding seven years. However, during his October 2005 interview with the DOE psychiatrist, the individual admitted that he had used cocaine twice in 1999.

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that is relevant to a determination regarding eligibility or DOE access authorization.” Criterion H relates to information that a person suffers from “[a]n illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause a significant defect in judgment or reliability.” Criterion J relates to information that a person has “been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.” Criterion L relates, in relevant part, to information that a person “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. . . .”

To support Criterion H, DOE Security relies on the DOE psychiatrist's opinion that the individual suffers from alcohol dependence which, in his opinion, is a mental condition that causes, or may cause a significant defect in judgment or reliability.

As for Criterion J, DOE Security first relies on the DOE psychiatrist's opinion that the individual is alcohol dependent and a user of alcohol habitually to excess. It also cites the following additional information: (1) the individual's 2003 arrest for Driving While Intoxicated (DWI) after he registered a blood alcohol concentration (BAC) of .13/.12; (2) his eviction from a local restaurant in 2001 for being disorderly, and his admission that he had been drinking alcohol before the incident; (3) his 2001 arrest for DWI after he registered a BAC of .14; (4) his termination from employment in 1998 for using profane language, and his admission that he had been drinking alcohol before the incident; and (5) his 1998 arrest for Driving Under the Influence (DUI) of alcohol and his admission he had been drinking alcohol before the arrest.

Finally, with respect to Criterion L, DOE Security cites the following information as evidence of a pattern of criminal activity and questionable behavior: (1) the individual's three arrests for drinking and driving; (2) the alcohol-related incidents that resulted in his being evicted from a restaurant in 2001 and fired from his job in 1998; (3) a police report that indicated that he had pushed a woman into her vehicle in 1992; (4) a 1988 arrest and charge for shoplifting and criminal damage; and (5) a history of illegal drug use from 1988 through 1999.

I find that the information set forth above constitutes derogatory information that raises questions about the individual's truthfulness under Criterion F, his mental health under Criterion H, his alcohol use under Criterion J, and his honesty, reliability and trustworthiness under Criterion L. Deliberate concealment, omission or falsification of relevant facts from personnel security questionnaires raises security concerns under Criterion F because it calls into question the individual's reliability and trustworthiness. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at Guideline E. The security concerns associated with Criteria H and J are as follows. First, a mental condition such as alcohol dependence can impair a person's judgment, reliability and trustworthiness. *See id.* at Guideline I. Second, the excessive consumption of alcohol itself is a security concern because that behavior can lead to the exercise of questionable judgment and the failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. *See id.* at Guideline G. The security concerns associated with Criterion L revolve around criminal activity, which calls into question a person's ability or willingness to comply with laws, rules and regulations (Guideline J), including illegal drug use, which similarly questions an individual's willingness to comply with laws, rules and regulations and raises an additional concern about impairment of judgment when under its influence (Guideline H).

#### **IV. Findings of Fact**

The Notification Letter recites many events in which the individual participated that have raised DOE Security's concerns. The individual does not contest the facts surrounding most of these events; factual disputes, where they exist, will be addressed below.

DOE Security's greatest concern is the individual's use of alcohol. The individual testified at the hearing that he has drunk to intoxication about twice a month, starting at age 18 and continuing through 2005.<sup>2</sup> His heaviest alcohol consumption occurred when he was a restaurant manager, and was permitted to remain after his shift and drink at no cost. During that period, when he was in his late 20s, he drank to intoxication once or twice a week for the first six months, and then up to three times a week. Tr. at 103-04.

Between 1998 and 2003, the individual had three alcohol-related arrests. With regard to the 1998 arrest for DUI, the individual admitted that he had consumed three or four beers within a two-hour period before that arrest. Tr. at 89. According to the individual, the court deferred sentencing him for this DUI if he attended alcohol education, participated in therapy and performed community service. Ex. 17 at 57. As for the 2001 DWI arrest, the individual admitted that he was intoxicated. Tr. at 91. Regarding the 2003 DWI, the evidence in the record is that the individual's BAC registered .13 and .12, respectively, approximately one hour after the arrest. Ex. 10 at 2.

The individual testified that the last time he had driven while he believed he was intoxicated was within the last two years. Tr. at 110. He admitted that he continues to drive after drinking—he admitted that he had driven after drinking the Sunday before the hearing—but stated, “[I]f I feel anything, where I think I am impaired to any degree, then I won't [drive].” Tr. at 110.

In addition to the individual's alcohol-related arrests, the individual engaged in unusual behavior on two occasions after consuming alcohol. One event occurred in 1998 while he was a restaurant manager. After consuming several beers after his shift, the individual got into an altercation, used profanity, and ultimately was fired from his job for his actions. Tr. at 85. The second event occurred in 2001, when as a restaurant customer he reached into the service area to obtain some ice for his friends' coffee. He had been drinking before this event, which escalated into disorderly conduct on his part, including throwing hot coffee on other persons in the restaurant. *Id.* at 86.

Beyond the concerns relating to the individual's alcohol use, DOE Security had additional security concerns that arose from his discrepant reporting of past illegal drug use (under Criterion F). The facts underlying the Criterion F concern are straightforward. In completing QNSPs in 2002 and 2004, the individual responded negatively to the question on those forms about whether he had not any illegal drugs within the past seven years. The DOE psychiatrist reported, however, that during his interview with the individual in 2005, the individual stated that he had used cocaine in 1999 “maybe twice.” Ex. 6 at 17.<sup>3</sup>

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<sup>2</sup> The individual testified that he was intoxicated once every two weeks when he was under age 21. Tr. at 102. He testified that he was intoxicated once every two weeks after he turned 21 *id.* at 98, but also that he drank once every two weeks but not intoxicated “every single time,” during ages 21 to 23. *Id.* at 95. He further stated that he was intoxicated once every two weeks from ages 23 to 25, *id.* at 97, and two to three times per month during graduate school, when he was ages 29 to 32. *Id.* at 105. From age 32 through the end of 2005, he was intoxicated once or twice a month, by his own report. *Id.* at 108.

<sup>3</sup> I note that the individual also related to DOE Security that he had used cocaine in 1999 during a personnel security interview in 2005. Ex. 16 at 75, 80.

Numerous incidents raised concerns for DOE Security under Criterion L, which focuses on unusual behavior that reflects poorly on a person's honesty, reliability and trustworthiness. Several of these incidents involved the use of alcohol and have been discussed above. An additional concern under this Criterion is the individual's history of drug use which, though extensive, appears to be in the past. Three other incidents are described below. At age 19, the individual was charged with shoplifting. He explained that he had eaten some candy he had taken from a supermarket's bulk bin. A manager told him he would have to pay for the candy, at which point he replaced the candy he had not eaten. The manager then told him he would have to pay for the entire contents of the bin. He ignored the manager, left the store, and was apprehended. Tr. at 26-28, 70. At age 23, according to a police report, Ex. 17 at 101, the individual pushed a woman into a vehicle. He explained that he had no recollection of pushing a woman, but believed the incident involved a fight with the man who was with the woman in question. Tr. at 71. Finally, in 2001 the individual was evicted from a restaurant. According to the individual's explanation, the service staff was very busy and he could not get anyone to give him some ice for his coffee. He reached into the service area to help himself to ice, when he was told he was not permitted in the service area. Tr. at 86. He did not feel intoxicated at the time, though he had been drinking earlier in the evening. He was unaware that the police, who arrived after he was outside, had charged him with trespass. *Id.* at 87.

#### **IV. Analysis**

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I have determined that the individual's access authorization should not be granted. I cannot find that granting the individual his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

##### **A. Criterion F**

In this case, the individual offered discrepant information concerning cocaine use in 1999. Specifically, he attested on security forms in 2002 and 2004 that he had not used any illegal drugs in the seven years prior to his execution of those forms, but in 2005 told a personnel security interviewer and the DOE psychiatrist that he had used cocaine in 1999. At the hearing, the individual testified that he had not in fact used cocaine in 1999. He explained that he attended a party at which a friend was offering cocaine. The friend was allegedly pressuring him to use the drug, and he claimed that he feigned inhaling the cocaine through a straw placed near the drug. Tr. at 74, 80. He stated:

I wanted to say, "Okay, I'm doing it, get off my back and leave it alone." There was a lot of peer pressure at this party, this guy saying, "Come on, come on, do it." So . . . I basically did what I needed to do to get him to stop pressuring me, and in doing that, I didn't get any effect from it, I didn't—I don't believe I had any in my system, or maybe negligible, but I . . . didn't, you know, snort cocaine. I didn't effectively use the drug. . . . I don't consider that using cocaine. So, no, I did not illegally use it.

Tr. at 77.

He maintained that his last actual use of illegal drugs was before 1995 and that he was candid when he stated in his QNSPs that he had not used any illegal drugs in the preceding seven years. Tr. at 120. He further explained that he had stated during interviews in 2005 that he had “used” cocaine in 1999, because he understood that it would be better to admit that he had attended the party in 1999 and “people [who might be interviewed] may think that I did it.” Tr. at 75.

The matter under consideration is not whether the individual actually inhaled cocaine at a particular party in 1999. It is rather whether the individual has been forthcoming in providing accurate information to DOE Security in course of its processing of his application for access authorization. I am not confident that I know what happened at that party in 1999. I do know, however, that one of two events occurred. One possibility is that the individual did inhale cocaine at the party, in which case he falsified his responses in his 2002 and 2004 security forms in an effort to cover up illegal drug use. The other possibility is that he did not inhale cocaine at the party, in which case he misstated the truth to the personnel security interviewer and the DOE psychiatrist. Assuming the latter is the case, I find that the individual has offered no plausible explanation for falsely admitting on two occasions to engaging in an illegal activity. Furthermore, I find that there is no evidence in the record that the individual explained to either the interviewer or the DOE psychiatrist the circumstances of his alleged feigned use of cocaine. Under either scenario, he succumbed, by his own admission, to peer pressure which caused him to behave in behavior that was either illegal or gave the appearance of being illegal. The evidence received in this proceeding has not convinced me that the individual has dealt with DOE Security in a straightforward manner. As a result, I cannot predict with confidence whether any statement the individual might make in the future to DOE Security would be truthful or not. *See Personnel Security Hearing*, Case No. TSO-0212, 29 DOE ¶ 83,002 at 86,738 (2007). Therefore, the individual has not successfully mitigated the security concern with respect to his truthfulness.

## **B. Criterion H**

In his report and his testimony, the DOE psychiatrist provided compelling evidence that the individual is alcohol dependent.<sup>4</sup> Moreover, he convinced me that the individual needs to demonstrate two years of abstinence with participation in Alcoholics Anonymous, or three years of abstinence with other treatment programs, to be considered adequately rehabilitated from his alcohol dependence, or five years of abstinence with no treatment, to be considered adequately reformed from his condition. Tr. at 150-52.

The individual testified that he is receiving no alcohol treatment or counseling, and is currently drinking. He also failed to present any expert testimony to rebut the DOE psychiatrist’s diagnosis in this case. After listening to all the testimony, the DOE psychiatrist testified that to find

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<sup>4</sup> It appears that the DOE psychiatrist could have diagnosed the individual with either alcohol dependence or alcohol abuse; he explained at the hearing that he believed alcohol dependence is more appropriate in the individual’s case, because “[s]ubstance dependence is heritable, substance abuse is not,” Tr. at 153, and the individual’s family history indicated that many of his relatives suffered from alcoholism. Tr. at 155.

adequate evidence in this case he needed to conclude that there is no more than a 10% risk that the individual would resume drinking within the next five years. *See* Tr. at 152. The DOE psychiatrist stated that he could not render this conclusion based on the evidence in this case and therefore opined that the individual has not demonstrated adequate evidence of rehabilitation or reformation from his alcohol dependence. On the strength of the uncontested DOE psychiatrist's testimony, I find that the individual has failed to mitigate the Criterion H security concerns before me and those security concerns under Criterion J that are predicated on the alcohol dependence diagnosis in this case.

### C. Criterion J

With respect to the Criterion J allegations based on habitual use of alcohol to excess, the DOE psychiatrist expressed his opinion that the individual was a user of alcohol habitually to excess, in every year from 1987 through 2005, with the exception of 1989 and 2004. Ex. 6 at 27.<sup>5</sup> The evidence in this case clearly supports that opinion. The individual has a long and significant history of alcohol-related incidents, including three arrests for drinking while driving, a firing, inappropriate public behavior; and frequent periods of intoxication.

At the hearing, the individual offered testimony in mitigation of this concern. He testified that once he began working for a DOE contractor until 2005, he reduced his alcohol consumption. Tr. at 105. He estimated that he drank alcohol only a few nights each month and did not always drink to intoxication. *Id.* He stated that he decreased his consumption further at the beginning of 2006, roughly six months before the hearing. *Id.* at 106-107. He testified that he now does not drink to excess, restricts his intake to one drink per hour, and switches to water if he feels "tipsy." *Id.* He also testified that he feels he can monitor and control the amount he drinks, and has no need for treatment. *Id.* at 114-15. He stated that he does not intend to become intoxicated in the future because he does not enjoy the sensation. *Id.* at 118. Moreover, he claimed that he prefers to remain in control of his thoughts and actions. *Id.* He attributed this change in behavior to his maturity and to his commitment to his girlfriend, who is now pregnant. He testified that he has had no legal problems of any sort within the last three years. *Id.* at 170-71.

Despite this testimony, I find negative elements in the facts before me that outweigh the positive ones. Much of his testimony is grounded in the individual's wishes and beliefs, but little of it is supported by evidence. While the individual claimed that his alcohol consumption has tapered off over the years that he has worked for a DOE contractor, *id.* at 105, he also admitted that as late as 2005, he was still getting intoxicated once or twice a month, Tr. at 108, roughly the frequency he has maintained since he began drinking alcohol. *See* note 2 *supra*. In addition, the individual has presented conflicting evidence regarding the level of his current alcohol consumption. In his March 2006 request for a hearing, he wrote that he no longer consumed alcohol. Three months later at the hearing, he stated that continues to drink alcohol, but no longer gets intoxicated. *Id.* at 108, 110. He also stated at the hearing that he could not recall whether he had been intoxicated since the beginning of 2006. Tr. at 108. He reported that the last time he had consumed alcohol had been the Sunday before the hearing. *Id.* The fact that he has resumed

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<sup>5</sup> With respect to his opinion that the individual has used alcohol habitually to excess, the DOE psychiatrist defined drinking "to excess" as drinking to the point of intoxication, and "habitually" as at least several times in a single year. Ex. 6 at 2, 12, 15, 20; Tr. at 140.

drinking alcohol after previously professing his sobriety demonstrates to me that he has failed to control his impulses regarding alcohol.

While it is positive that the individual intends to cut back on his alcohol consumption, and apparently has not become intoxicated since January 2006, I am not convinced that these changes will be sufficient to support his sobriety in the long term. First, the individual has not recognized the severity of his alcohol-related problem and lacks insight into the difficulty he faces in maintaining his sobriety. He is minimizing the effect of alcohol on his work obligations, including his request for access authorization, and denies the control alcohol has over him. Second, despite his apparent sincerity and motivation, I find that he lacks the tools for the job. By choosing not to participate in any form of treatment or counseling, the individual may be less likely on his own to avoid the pitfalls that alcohol has placed before him in the past. In the end, the risk that he will resume drinking to intoxication is simply too great to entrust him with access authorization.

For all the reasons set forth above, I find that the individual has not mitigated the security concerns associated with his habitual use of alcohol to excess under Criterion J.

#### **D. Criterion L**

The derogatory information that raises concerns about the individual's honesty, reliability and trustworthiness arose from two categories of incidents: those in which alcohol was a factor and those in which it was not. The alcohol-related incidents have been discussed above. These incidents demonstrate that his judgment and reliability have been questionable in the past. Because I have concluded that DOE Security's concerns regarding the individual's alcohol consumption have not been mitigated, I must correspondingly conclude that his judgment and trustworthiness with respect to alcohol-related behavior remain concerns under Criterion L as well.

DOE Security cites three additional incidents, in which alcohol was not apparently a factor, that nevertheless raise further questions regarding the individual's honesty, reliability and trustworthiness. The individual has ably pointed out mitigating evidence regarding each of these incidents. The first, his history of illegal drug use, ended many years ago. He contends that his last use was before 1995, while he was still a student. Tr. at 82 (no cocaine use since age 18 or 19); Ex. 16 at 53 (marijuana while in college), 92 (mushrooms while in college). Even if I assume, contrary to his contention, that the individual did use cocaine in 1999, rather than feign using it, that event occurred fairly long ago, and there is no evidence that he has used illegal drugs since then. The second event, pushing a woman in anger into a car in 1992, is an incident the individual claims not to remember, though he does recall a fight with a man that might have led to the woman filing a complaint with the police. Even if I assume that the individual is correct that his fight was with a man and not the woman, and I further assume that no alcohol was involved, the incident still raises a concern that the individual was unable to control his anger and his impulses. Thus, I am somewhat concerned about how he would react in other stressful situations. Nevertheless, the incident occurred nearly 15 years ago, and there is no evidence of more recent displays of anger, other than when alcohol was involved. The third incident in this category is the shoplifting that occurred when he was a teenager. Because it

occurred long ago and at a time when the individual was immature, this incident, standing alone, does not raise a significant security concern.

The real concern under Criterion L, in my opinion, does not lie in the incidents themselves, but rather in a frame of mind that they illustrate. The shoplifting incident demonstrates that, as a teenager he did not perceive that taking items, even small ones, without paying for them is inappropriate. Moreover, he failed to see that replacing candy he had handled back into a bin created a public health concern. A teenager's failure to comprehend these things can be excused but, in this case, the pattern of self-interest has continued into his adult years. Years later, he was dispatched from a restaurant for helping himself to ice from the service area. As a restaurant manager, he clearly understood the public health implications of customers entering the food preparation area, yet he put his own interests before the rules that have been imposed to protect the public. His three arrests for driving while intoxicated also illustrate a mindset in which he placed his need to drive ahead of the public's expectation, through motor vehicle laws, that roads will be safe for passage. Moreover, even at the hearing, he did not acknowledge that it was questionable to engage in a physical brawl involving cue sticks or a verbal confrontation at his workplace. The overall picture he has painted, through these incidents, is that he sometimes impulsively chooses not to follow certain laws, rules, and norms of conduct when they do not meet his needs. The explanations for his actions that he offered in mitigation of DOE Security's concerns, such as why he served himself in the restaurant and why he verbally abused a customer in his restaurant, were justifications that lacked insight into underlying causes, such as excessive alcohol consumption. The individual's explanations did not reassure me that the actions were out of character or excusable. While I recognize that most of the individual's conduct is within the law and societal expectations, his history of unusual activity leaves a question in my mind as to whether he would abide by rules and regulations that govern handling of classified material.

It is my opinion that the individual has not mitigated all of the security concerns that DOE Security has raised under Criterion L.

## **V. Conclusion**

As explained in this Decision, I find that DOE Security properly invoked 10 C.F.R. § 710.8(f) , (h), (j) and (l) in determining that it could not grant the individual's access authorization without resolving concerns raised by derogatory information it received regarding the individual. For the reasons I have described above, I find that the individual has not sufficiently mitigated the security concerns raised in this case. I therefore cannot find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be granted. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28

William M. Schwartz  
Hearing Officer  
Office of Hearings and Appeals

Date: July 30, 2007